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No. 08-1375

IN THE

Supreme Court of the United States

CASSENS TRANSPORT COMPANY, CRAWFORD & COMPANY, AND DR. SAUL MARGULES,

Petitioners,

v.

PAUL BROWN, WILLIAM FANALY, CHARLES THOMAS, GARY RIGGS, ROBERT ORLIKOWSKI, AND SCOTT WAY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

MARSHALL D. LASSER
P.O. BOX 2579
Southfield, MI 48037

DEEPAK GUPTA
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Respondents

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QUESTIONS PRESENTED

Under the McCarran-Ferguson Act's reverse-preemption provision, no federal statute may be construed to "impair" a state law enacted "for the purpose of regulating the business of insurance." The questions presented are:

1. Whether the Sixth Circuit erred in holding that the Michigan Worker's Disability Compensation Act (WDCA) is not a law enacted "for the purpose of regulating the business of insurance" based on the following independent rationales:

   (a) Workers' compensation benefits under the WDCA are not insurance.

   (b) The purpose of the WDCA was not to regulate the business of insurance.

   (c) Self-insurance is not the business of insurance.

2. Whether, even if the Sixth Circuit's holding and all three of those rationales were incorrect, a claim under the federal Racketeer Influenced and Corrupt Organizations Act (RICO) seeking remedies for a pattern of fraud in the denial of workers' compensation benefits would "impair" the WDCA.

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INTRODUCTION

The McCarran-Ferguson Act's reverse-preemption provision precludes federal statutes from operating to "impair" state law enacted "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). The Sixth Circuit held that respondents' RICO claims—alleging fraudulent denial of workers' compensation benefits by their self-insured Michigan employer—do not run afoul of that provision.

For three independent reasons, the court below correctly concluded that this case does not threaten state law enacted "for the purpose of regulating the business of insurance." *First*, workers' compensation benefits are not insurance in the first place. *Second*, the purpose of Michigan's workers' compensation statute is not insurance regulation. *Third*, self-insurance is not insurance. And even if insurance were at issue, state law would not be "impaired" under this Court's unanimous decision in *Humana, inc. v. Forsyth*, 525 U.S. 299 (1999), which held that RICO claims seeking remedies unavailable under state law for fraud by an insurer were not precluded by the McCarran-Ferguson Act.

The petition does not contend that this case implicates any conflict among the lower courts, let alone a conflict on an important question of federal law. Instead, the petition asks this Court to grant review because petitioners believe the Sixth Circuit mischaracterized Michigan law. This Court does not sit to resolve disputes that turn on the law of a single state, particularly where, as here, the case is in an interlocutory posture and implicates no circuit split. In any event, the Sixth Circuit's rejection of petitioners' reverse-preemption theories was correct on multiple grounds—and no court has held otherwise.

STATEMENT

1. The Facts. Respondents are six current and former Michigan employees of Cassens Transport Company. They allege that Cassens, along with co-defendants Crawford & Company and Dr. Saul Margules, conspired to fraudulently deny them workers' compensation benefits, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961(1)(B), 1962(c), 1964(c). Crawford is a contractor charged with administering workers' compensation claims made by Cassens employees, and Dr. Margules was a physician charged with determining the respondents' eligibility for benefits.

Respondents allege that Cassens and Crawford deliberately and systematically made use of "cut-off doctors"—physicians, like Margules, whom Cassens and Crawford knew would reliably provide fraudulent medical opinions stating that a claimant did not have a work-related disability, regardless of whether such a disability existed and despite known medical evidence to the contrary. Pet. App. 3a.

Cassens is in the business of transportation, not insurance. As permitted by Michigan law, the company does not maintain any insurance to cover claims by its workers under the Michigan Worker's Disability Compensation Act (WDCA), Mich. Comp. Laws §§ 418.631-418.801. Instead, Cassens is "self-insured," meaning that the company may "make payments directly to [its] employees as the employees become entitled to receive the payment" under the WDCA. Mich. Comp. Laws § 418.611(1)(a).

2. The Proceedings Below. Petitioners (collectively, "Cassens") sought dismissal of respondents' complaint on any of seven alternate grounds, arguing that their

RICO and state-law claims were barred by (1) the primary-jurisdiction doctrine; (2) the *Burford* abstention doctrine;[1] (3) failure to plead predicate acts of witness tampering; (4) failure to plead predicate acts of mail or wire fraud with particularity; (5) failure to plead detrimental reliance; (6) reverse preemption under the McCarran-Ferguson Act; and (7) preemption under the Labor Management Relations Act. The district court decided, among other things, that the RICO claims were reverse preempted and, in any event, failed to state claims for which relief could be granted. Pet. App. 32a.

A divided Sixth Circuit panel initially affirmed the dismissal, holding that respondents had failed to plead detrimental reliance on the alleged misrepresentations. *Brown v. Cassens Transp. Co.*, 492 F.3d 640 (6th Cir. 2007). This Court vacated and remanded that decision for further consideration in light of *Bridge v. Phoenix Bond & Indemnity Co.*, --- U.S. ---, 128 S. Ct. 2131 (2008), which held that a RICO plaintiff need not plead detrimental reliance.

3. The Decision Below. On remand from this Court's GVR order, the Sixth Circuit unanimously reversed the district court's dismissal. Pet. App. 1a. The court held that respondents sufficiently alleged that Cassens had engaged in a pattern of racketeering activity and that their injuries were caused by the alleged fraud. Pet. App. 4a-15a. As for the McCarran-Ferguson Act, the court held that respondents' RICO claims were not reverse preempted because this case does not implicate any state laws enacted "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b).

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[1] *See Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

First, the court rejected Cassens' "benefits-as-insurance" theory—the notion that workers' compensation benefits themselves are a form of insurance, creating an "insurance-like relationship in which the employer is the 'insurer' and the employee is the 'insured.'" Pet. App. 19a. To the contrary, the court found all three factors this Court uses to assess whether a practice is "insurance" under the McCarran-Ferguson Act to be lacking: (1) workers' compensation does not have "the effect of transferring or spreading a policyholder's risk" to an insurer, but instead replaces an employer's preexisting common-law duty with a statutory compensation requirement; (2) there is no contractual "policy relationship" between an insurer and an insured who agrees to indemnify the insured against risk in exchange for consideration; and (3) the law is not "limited to entities within the insurance industry," but covers all employers. *Id.* 20a-21a (quoting *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982)).

Second, the court held that the purpose of the WDCA was not to regulate insurance, but to replace the employer's preexisting tort duty with a statutory requirement "to compensate a worker for any injury suffered in the course of the worker's employment, regardless of who was at fault." *Id.* 21a. That insurance regulation was not the purpose, the court observed, is underscored by the fact that the WDCA is placed in the labor code, not the insurance code, and administered by the Worker's Compensation Agency, not state insurance regulators. *Id.* 22a.

Third, although the first two holdings "each independently foreclose[d]" the reverse-preemption defense, the court also addressed Cassens' "insurance-provisions" theory—which relies on the fact that the WDCA contains provisions allowing an employer to buy insurance to

secure workers' compensation payments. Under that theory, "the employer is the insured and the company providing the insurance is the insurer." *Id.* 23a. Although that theory might apply to certain insurance transactions, the court explained, it fails here because this case does not involve insurance for yet another reason: Cassens is self-insured, and self-insurance is not the business of insurance. *Id.* 24a.

Finally, the Sixth Circuit "note[d]" that the reverse-preemption defense would fail even if workers' compensation were insurance because respondents' RICO claims would not "impair" the WDCA under the framework articulated by this Court in *Humana*, 525 U.S. 299, which also involved the interaction between RICO and the McCarran-Ferguson Act. Pet. App. 26a. Under *Humana*, "[w]hen federal law does not directly conflict with state regulation, and when application of federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application." *Humana*, 525 U.S. at 310. First, because *Humana* calls for an "as applied" analysis, and because Cassens self-insures, the court found no risk that RICO would impair any state policy relating to insurance regulation. Pet. App. 26a. Second, as in *Humana*, there was no evidence that state law would tolerate fraud, or that the RICO claims would frustrate any declared state policy or administrative scheme, and the state filed no brief to the contrary. *Id.* 26a-27a.

Cassens filed a petition for rehearing en banc, focusing primarily on its disagreement with the panel's characterization of Michigan law. Because no judge requested a vote on whether to rehear the case en banc, the petition was summarily denied. *Id.* 74a.

REASONS FOR DENYING THE WRIT

I. THE FIRST QUESTION TURNS LARGELY ON STATE LAW, IMPLICATES NO CIRCUIT SPLIT, AND WAS CORRECTLY DECIDED BELOW.

Cassens does not contend that this case implicates any conflict among the lower courts on an important question of federal law. Instead, its chief complaint about the decision below, to which it devotes the bulk of its petition (Pet. 10-24), boils down to its dissatisfaction with the way that a panel of the Sixth Circuit characterized Michigan law.

Specifically, Cassens criticizes the Sixth Circuit's conclusion that this case does not implicate state law enacted "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). Emphasizing that Congress's concept of the "business of insurance" was derived "largely from state law, from state practice, from state usage," Pet. 15, Cassens contends that the Sixth Circuit misunderstood the purpose and effect of Michigan's workers' compensation regime. The petition repeatedly criticizes the Sixth Circuit for "tak[ing] no account of the actual content of the applicable state law," *id.* 13, overlooking "how Michigan actually treats workers' compensation benefits," *id.* 15-16, and neglecting to "carefully parse" the Michigan statute. *Id.* 17.

This Court, however, does not generally grant certiorari to resolve disputes that turn on the law of a single state. A decision on such a question, "whether right or wrong, does not have the kind of national significance that is the typical predicate for the exercise of [] certiorari jurisdiction," *Leavitt v. Jane L.*, 518 U.S. 137, 146-47 (1996) (Stevens, J., dissenting), and the Court's custom in such disputes is to "defer to the interpretation of the

Court of Appeals for the Circuit in which the State is located." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 16 (2004); *see MacGregor v. State Mut. Life Assurance Co.*, 315 U.S. 280, 281 (1942) (per curiam) ("[W]e shall leave undisturbed the interpretation [of Michigan law concerning insurance] by three circuit judges whose circuit includes Michigan.").

In any event, the Sixth Circuit carefully analyzed Michigan's workers' compensation law under the test articulated by this Court in *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 129 (1982). Pet. App. 17a-24a. That test uses three factors to assess whether a certain practice constitutes the "business of insurance" under the McCarran-Ferguson Act. Based on its analysis of Michigan law, the court concluded that none of the three factors is present: (1) the WDCA does not transfer risk, but is rather a replacement for the employer's preexisting tort liability; (2) there is no insurance contract, and no insurer-insured policy relationship; and (3) the WDCA applies to all employers, not only to the insurance industry. Pet. App. 20a-21a. The petition agrees that the *Pireno* factors supply the correct test, but takes issue with their "application" in this case "to the Michigan's workers' compensation statute." Pet. 2, 4. Certiorari, however, is unwarranted where the asserted error consists of no more than "the misapplication of a properly stated rule of law." S. Ct. Rule 10. And as demonstrated below, the court's application of the law was correct for three wholly independent reasons.

A. Workers' Compensation Benefits Under Michigan Law Are Not Insurance.

The Sixth Circuit correctly rejected Cassens' "benefits-as-insurance" theory—the theory that workers' compensation benefits under Michigan law are them-

selves "insurance" within the meaning of the McCarran-Ferguson Act. The petition cites no authority, state or federal, adopting that theory. Indeed, the petition neglects to acknowledge considerable authority to the contrary.[2]

In the face of that contrary authority, the best support Cassens can muster is a snippet of case law describ-

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[2] *See, e.g.*, *Harrison v. Digital Health Plan*, 183 F.3d 1235, 1241 (11th Cir. 1999) ("Workers' compensation is not insurance in the ordinary sense of the term[.]"); *Wash. Ins. Guar. Ass'n v. Dep't of Labor and Indus.*, 859 P.2d 592, 595 (Wash. 1993) ("Workers' compensation benefits are paid under state law, not under an insurance policy.") (citation omitted); *Ala. Ins. Guar. Ass'n v. Magic City Trucking Serv., Inc.*, 547 So. 2d 849, 850-53 (Ala. 1989) ("Although an employer's obligations under the Workmen's Compensation statutes are often insured, workmen's compensation benefits are not insurance benefits."); *Nance by Nance v. West Side Hosp.*, 1986 WL 10886, at *3 (Tenn. Ct. App. 1986), *aff'd*, 750 S.W.2d 740 (Tenn. 1988) ("Worker's compensation is not insurance. It is the statutory responsibility and liability of the employer to furnish to an injured employee treatment and other benefits provided by law.") (citations omitted); *Aetna Ins. Co. v. Smith*, 568 S.W.2d 11, 14 (Ark. 1978) ("Workmen's compensation is not insurance, and it was not contemplated that it be so considered. . . . It is illusory to say that the injured workman had paid for workmen's compensation benefits or that workmen's compensation is a type of disability insurance."); *Auto Salvage Co. v. Rogers*, 342 S.W.2d 85, 89 (Ark. 1961) ("[T]he Workmen's Compensation Act is not an insurance policy.") (citation omitted); *Laird v. State Highway Dep't*, 323 P.2d 1079, 1089 (Idaho 1958) ("This Court has in numerous cases stated that Workmen's Compensation is not insurance[.]"); 9 COUCH ON INSURANCE § 133:2 (2009) ("Workers' compensation programs, requiring that employers compensate employees, are not themselves insurance."); Floyd L. Daggett, *Workmen's Compensation in Washington State*, in PROCEEDINGS OF THE NATIONAL CONVENTION OF INSURANCE COMMISSIONERS 229 (1914) ("Workmen's compensation is not insurance and should not be confused with the insurance idea. Insurance means a contract between the insured and the insurer.").

ing workers' compensation as "insurance of a social character." Pet. 2, 16 (quoting *Lauder v. Paul M. Wiener Foundry*, 72 N.W.2d 159, 172 (Mich. 1955)). But, as Michigan courts have recognized, "social insurance" programs (such as Medicare, Social Security, or unemployment compensation) are a very different animal from "the business of insurance." *See Imvris v. Mich. Millers Mut. Ins. Co.*, 198 N.W.2d 36, 38 (Mich. Ct. App. 1972) ("Medicare is social welfare legislation passed by the Congress to aid the general health and welfare of those over 65 years of age. Although classified as social insurance, it is clearly not an insurance program within the ordinary meaning of the term insurance."); Lloyd Harger, Fla. Div. of Workers' Comp., *Workers' Compensation: A Brief History*, http://www.fldfs.com/wc/history.html ("Workers' compensation is not 'insurance'; rather, it is social insurance, much the same as unemployment compensation and social security."); *see also Flemming v. Nestor*, 363 U.S. 603, 609 (1960) (contrasting Social Security, which is "a form of social insurance," with insurance and pension plans, which are contractual).

Nevertheless, Cassens argues (at 14) that the Sixth Circuit was wrong to regard the WDCA as imposing a statutory compensation obligation on employers rather than creating a "true contractual accident-insurance relationship." Pet. App. 20a. In this regard, Cassens cites several cases for the proposition that Michigan law regards the obligation to pay workers' compensation benefits as an implied term of the employment contract. While the Michigan Supreme Court has "characterized workers' compensation as a liability arising out of the contract of employment," it has "nonetheless consistently emphasized that workers' compensation is a matter of statutory grace," *Selk v. Detroit Plastic Prods.*, 345 N.W.2d 184, 188 (Mich. 1984)—a feature that

makes it distinctly unlike an insurance contract. The court uses that same phrase—"a matter of statutory grace"—to describe the status of other social insurance programs, such as unemployment compensation. *Dow Chem. Co. v. Curtis*, 430 N.W.2d 645, 650 (Mich. 1988).[3]

That Michigan law sometimes characterizes the statutory obligation to pay benefits as arising out of the *employment* contract, moreover, does not in any way create a contractual *insurance* relationship between an insurer and insured. "By its own terms, the McCarran-Ferguson Act applies only to the business of insurance and has no application to employment practices." *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1087 n.17 (1983). Insurance, at a minimum, requires a "contract by which

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[3] Both this Court and the Michigan Supreme Court have made clear that benefits under the Michigan WDCA—as with other social insurance programs but unlike true contractual relationships—may be altered by the legislature without impairing the freedom of contract. *See McAvoy v. H.B. Sherman Co.*, 258 N.W.2d 414, 432-33 (Mich. 1977); *Lahti v. Fosterling*, 99 N.W.2d 490, 495-99 (Mich. 1959). In *General Motors Corp. v. Romein*, 503 U.S. 181 (1992), a case Cassens cites, this Court rejected GM's Contract-Clause challenge to an amendment mandating retroactive payments under the WDCA because there was "no contractual relationship regarding the specific workers' compensation terms allegedly at issue." *Id.* at 186-87. The Court also rejected GM's argument that the WDCA was "an implied term of the contracts" because "Michigan law does not explicitly imply a contractual term allowing an employer to depend on the closure of past disability compensation periods." *Id.* at 188; *see also Hisquierdo v. Hisquierdo*, 439 U.S. 572, 575 (1979) ("Like Social Security, and unlike most private pension plans, railroad retirement benefits are not contractual. Congress may alter, and even eliminate, them at any time."); *Cudahy Packing Co. of Neb. v. Parramore*, 263 U.S. 418, 423 (1923) (workers' compensation rests not upon "implied contract," but upon a statutory entitlement to compensation).

one party (the insurer) undertakes to indemnify another party (the insured) against risk of loss, damage, or liability arising from the occurrence of some specified contingency." Pet. App. 19a (quoting *Black's Law Dictionary*); *see Norris*, 463 U.S. at 1087 n.17 (distinguishing between the "business of insurance" and the employer-employee relationship, and stressing that insurance "involves some investment risk-taking on the part of the company"); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 212 (1979) (describing the "underwriting or spreading of risk" as an "indispensable characteristic of insurance"). By contrast, "workers' compensation regimes substitute" for preexisting "tort liability." *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 662 (2006). Because it replaces a preexisting duty, the workers' compensation scheme does not transfer risk from an insured to an insurer, Pet. App. 20a—a point the petition fails to rebut.

B. Michigan's Workers' Compensation Statute Was Not Enacted for the Purpose of Regulating the Business of Insurance.

Along the same lines, the petition gives short shrift to one of the key independent rationales on which the Sixth Circuit relied in rejecting Cassens' reverse-preemption defense: that the Michigan WDCA was not enacted for the *purpose* of regulating the "business of insurance." As the decision below explained, the purpose of the WDCA "was to require an employer to compensate a worker for any injury suffered in the course of the worker's employment, regardless of who was at fault." Pet. App. 21a-22a (quoting WELCH, WORKER'S COMPENSATION IN MICHIGAN: LAW AND PRACTICE § 1.2 (4th ed. 2001)); *see also McAvoy*, 258 N.W.2d at 423 (the "objective" was "to provide the disabled worker with benefits during the period of his disability"). As discussed above, that com-

pensation objective has always been understood not as creating a contractual insurance relationship that transfers risk from an insured to an insurer, but as replacing a pre-existing duty—a purpose that is fundamentally incompatible with Cassens' benefits-as-insurance theory. Pet. App. 20a.

Cassens' position, in other words, cannot be reconciled with what this Court has called "the essential character of workers' compensation regimes. Unlike pension provisions or group life, health, and disability insurance plans," workers' compensation statutes "modify, or substitute for, the common-law tort liability to which employers were exposed for work-related accidents." *Howard Delivery Serv.*, 547 U.S. at 66; *see D.C. v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 134 (1992) (Stevens, J., dissenting) ("Workers' compensation laws provide a substitute for tort actions by employees against their employers."); 6 LARSON & LARSON, WORKERS' COMPENSATION LAW 100-2 (2005). As the Michigan Supreme Court put it in 1934, the "paramount object has been for the enactment of what has been claimed to be more just and humane laws to take the place of the common-law remedy for the compensation of workmen for accidental injuries received in the course of their employment, by the taking away and removal of certain defenses in that class of cases." *Johns v. Wisc. Land & Lumber Co.*, 256 N.W. 592, 594 (Mich. 1934); *see also Grand Rapids v. Crocker*, 189 N.W. 221, 224 (Mich. 1922) ("The statute is a remedial one."). Cassens points to no countervailing evidence to suggest that the purpose of the WDCA was to regulate the business of insurance. That failure "independently foreclose[s]" Cassens' reverse-preemption defense. Pet. App. 22a.

C. Self-Insurance Is Not the Business of Insurance.

1. The petition also devotes several pages (18-24) to its disagreement with the Sixth Circuit's "additional[] note" (Pet. App. 22a), which concluded that the practice of "self-insurance" does not fall within the "business of insurance" for purposes of the McCarran-Ferguson Act.

Once again, the petition cites no authority reaching a contrary conclusion under the McCarran-Ferguson Act. Indeed, the petition conspicuously omits any mention of the overwhelming body of law holding that self-insurance is not "insurance" at all, let alone the "business of insurance."[4] Nor does the petition acknowledge that the standard insurance-law treatises take the same position.[5]

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[4] *See, e.g., Esposito v Simkins Indus., Inc.*, 943 A.2d 456, 465 (Conn. 2008) ("[T]he fact that a self-insuring employer has chosen to retain its own workers' compensation risk rather than purchase insurance does not transform a company's business to that of insurance. . . . [T]he employer is not 'doing any kind or form of insurance business[.]'"); *Morrison v. Toys "R" Us, Inc.*, 806 N.E.2d 388, 391 (Mass. 2004) ("A self-insuring employer under the workmen's compensation law does not become an insurance company."); *Simmons v. Puu*, 94 P.3d 667, 683 (Haw. 2004) ("[S]elf-insurance is not insurance at all."); *Chambi v. Regents of Univ. of Cal.*, 95 Cal App. 4th 822, 825 (Cal. Ct. App. 2002) ("It is axiomatic that self-insurance is not insurance. . . . [S]elf-insurance, which is equivalent to no insurance, is repugnant to the concept of insurance which fundamentally involves the shifting to a third party, by contract, for a consideration, the risk of loss as a result of an incident or event."); *Doucette v. Pomes*, 724 A.2d 481, 489-90 (Conn. 1999) ("[A] self-insurer is not an insurer" and "self-insurance is not insurance at all."); *Hertz Corp. v. Robineau*, 6 S.W.3d 332, 336 (Tex. App. 1999) ("[A] self-insurer does not provide insurance at all."); *Cordova v. Wolfel*, 903 P.2d 1390, 1392 (N.M. 1995) ("Most authorities agree that self-insurance is not insurance. Insurance is a contract whereby for consideration one party agrees to indemnify or guarantee

(Footnote continued...)

As these authorities make clear, when Cassens "did not purchase insurance to cover its risk" but instead "complied with the Workers' Compensation Act by retaining its own risk," it was not "transformed into an insurer." *Doucette*, 724 A.2d at 481. Instead, Cassens "retained its character as an employer that simply elected to pay the expenses associated with its employees' work-related accidents. Although this is commonly referred to as self-insuring, there was no transfer of risk, which is generally considered to be an essential element of an insurance relationship." *Id.* In short, a "self-insuring employer under the workmen's compensation law does not become an insurance company," and hence is not "engaged in the business of insurance." *Anzalone v. Mass. Bay Transp. Auth.*, 526 N.E.2d 246, 248 (Mass.

(...continued)
another party against specified risks."); *Bowens v. Gen. Motors Corp.*, 608 So.2d 999, 1003 (La. 1992) ("[S]elf-insurance is, in actuality, not insurance at all."); *Physicians Ins. Co. of Ohio v. Grandview Hosp. & Med. Ctr.*, 542 N.E.2d 706, 707 (Ohio Ct. App. 1988) ("[S]elf-insurance is not insurance; it is the antithesis of insurance. Insurance shifts the risk of loss from an insured to an insurer. Self-insurance is the retention of the risk of loss by the one upon whom it is directly imposed by law or contract."); *Am. Nurses Ass'n v. Passaic Gen. Hosp.*, 471 A.2d 66, 69 (N.J. Super. Ct. App. Div. 1984) (same).

[5] *See, e.g.*, KEETON & WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES AND COMMERCIAL PRACTICES § 1.3(c), at 13-14 (1988) ("[A]lthough an entity that handles the risk of tort claims in this manner is sometimes referred to as a 'self-insurer,' this approach involves no insurance as the term is ordinarily used in regulatory statutes or in other legal contexts."); 12 APPLEMAN & APPLEMAN, INSURANCE LAW AND PRACTICE § 7002, at 22 (1981) ("A certificate of self-insurance can in nowise be equated with an insurance contract or policy"); DENENBERG, ET AL., RISK AND INSURANCE 79 (1964) ("For those who believe that transfer of risk is a requisite for insurance, the term self-insurance is a misnomer since it permits no transfer.").

1988); *see also Ogden v. Mont. Power Co.*, 747 P.2d 201, 204-05 (Mont. 1987); *Richardson v. GAB Bus. Servs., Inc.*, 207 Cal. Rptr. 519, 523-25 (Cal. Ct. App. 1984).

The case law in some states distinguishes between independent self-insurers like Cassens, which are not in the business of insurance at all, and self-insurer *group* plans, which take on certain characteristics of insurance (chiefly, the pooling of risk among employers). But in Michigan, even such "self-insurer groups have not historically been considered to be engaged in the business of insurance so as to be normally subject to regulation by the Insurance Commissioner." *Health Care Ass'n Workers Comp. Fund v. Dir. of the Bureau of Worker's Comp.*, 694 N.W.2d 761, 769 (Mich. Ct. App. 2005). In short, Cassens' discussion of self-insurance is incompatible with the overwhelming weight of authority.

2. Stretching to create the appearance of a conflict on this point, the petition (at 18-21) contends that the Sixth Circuit's analysis of self-insurance "cannot be squared" with this Court's decisions in *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003), and *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002). The claimed conflict is illusory.

To begin with, both cases involved ERISA, not workers' compensation or the McCarran-Ferguson Act. And unlike the McCarran-Ferguson Act, which is concerned with whether certain practices constitute "the business of insurance," ERISA's insurance-savings clause "asks merely whether a state law . . . 'regulates insurance, banking, or securities.'" *Miller*, 538 U.S. at 340 (contrasting 15 U.S.C. § 1012(b) with 29 § 1144(b)(2)(A)); *see* Pet. App. 18a n.6. In *Miller* itself, this Court made "a clean break from the McCarran-Ferguson factors" for purposes of ERISA, explaining

that, in light of the substantially different language in the two statutes, "use of the McCarran-Ferguson case law in the ERISA context has misdirected attention, failed to provide clear guidance to lower federal courts, and . . . added little to the relevant analysis." 538 U.S. at 339-42.

If anything, *Miller*'s discussion of self-insured group plans actually weakens Cassens' position. In the footnote on which Cassens relies, the Court concluded that the mere fact that a Kentucky statute regulating insurance plans also applied to self-insured non-ERISA group plans "did not forfeit[] its status" as a law regulating insurance under ERISA. *Id.* at 336 n.1; *see also Rush Prudential HMO*, 536 U.S. at 372 ("[T]here is no reason to think Congress would have meant such minimal application to noninsurers to remove a state law entirely from the category of insurance regulation saved from preemption."). In reaching that conclusion, this Court stressed not only that such group plans (unlike independent self-insureds) pool risk among employers, but also that ERISA's insurance-savings clause (unlike the McCarran-Ferguson Act) "does not require that a state law regulate 'insurance companies' or even 'the business of insurance'" to fall within its coverage. *Miller*, 538 U.S. at 336 n.1. The latter distinction suggests that the analysis would be quite different under the McCarran-Ferguson Act—even as to the group plans involved in that case.

II. THE SECOND QUESTION DEPENDS ON THE OUTCOME OF THE FIRST QUESTION, AND IS EQUALLY UNCERTWORTHY.

The second question presented asks whether respondents' RICO claims would "impair" Michigan's workers' compensation law. But that question only arises if Cas-

sens can overcome all three of the rationales put forth by the Sixth Circuit on the first question presented. Cassens, in other words, must first demonstrate that (1) statutory workers' compensation benefits are truly insurance, (2) Michigan's workers' compensation law was enacted for the purpose of regulating the business of insurance, *and* (3) self-insurance is indeed insurance. Because Cassens failed below on all three counts, the Sixth Circuit did not engage in as extensive an analysis of the impairment question, but instead "note[d]," in the alternative, its rejection of Cassens' position. Pet. App. 24a.

Even assuming these hurdles could be overcome, the second question presented is no more certworthy than the first. Once again, Cassens seeks error correction, faulting the Sixth Circuit for failing to "engage in any independent consideration of the relevant state law," and for misapplying this Court's decision in *Humana* to the facts of the case. Pet. 24-29. Neither complaint justifies review.

The petition first attacks the Sixth Circuit's conclusion that, "because Cassens self-insures, there is no risk of any impairment of state policy relating to the regulation of insurance." Pet. App. 26a. But Cassens questions only the premise of that statement, repeating its claim that self-insurance is insurance. Given the overwhelming authority for the proposition that self-insurance is *not* the business of insurance, discussed above in Part I.C, this rationale provides reason enough to reject the reverse-preemption defense.

In the alternative, the petition attacks the Sixth Circuit's analysis under the framework established by this Court in *Humana*. Again, Cassens does not raise

any important question of federal law, but takes issue only with the application of *Humana* to Michigan law.

In *Humana*, this Court considered whether the McCarran-Ferguson Act precludes beneficiaries from bringing RICO claims alleging a pattern of fraud on the part of an insurer, where the remedies available under RICO are different from those available under state law. *Humana*, 525 U.S. at 305. The Court held that, even though Nevada had a competing but less robust system of remedies for the same fraudulent conduct, the application of RICO to a pattern of fraudulent denial of insurance did not "frustrate any declared state policy or interfere with [the state's] administrative regime," and hence "the McCarran-Ferguson Act does not preclude its application." *Id.* at 310.

The Sixth Circuit correctly concluded that "*Humana* applies equally here." Pet. App. 26a. There is neither authority for the proposition that Michigan has a declared state policy permitting fraudulent denial or precluding a federal civil action arising out of such conduct, nor any evidence that its administrative scheme precludes such a federal action. *Id.* 25a-27a. The petition complains that a RICO suit would "disrupt" Michigan's "system of remedies," a complaint that was also made by the defendants in *Humana*. Pet. 26. If anything, the case for impairment was *stronger* in *Humana*, where Nevada law expressly prescribed a different, lesser damages remedy for precisely the same conduct. Finally, as in *Humana*, "the fact that the state 'filed no brief at any stage of this lawsuit urging that application of RICO to the alleged conduct would frustrate any state policy, or interfere with the State's administrative scheme' further

supports the conclusion that there is no impairment here." *Id.* 27a (quoting *Humana*, 525 U.S. at 314).[6]

III. THE INTERLOCUTORY POSTURE OF THIS CASE UNDERSCORES THAT REVIEW SHOULD BE DENIED.

Apart from the soundness of the decision below and the absence of any conflict on an important issue of law, certiorari is also unwarranted because this case is in an interlocutory posture. The Sixth Circuit held that the district court erred in dismissing the complaint and remanded the case for proceedings on the merits. Should Cassens prevail on the merits, the questions it now seeks to present will become academic. Should respondents prevail on the merits, Cassens will be able to present those issues to this Court following entry of a final judgment. This Court ordinarily awaits the entry of final judgment before granting review, *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967), and there is no reason to depart from that settled practice here. *See* GRESSMAN, ET AL., SUPREME COURT PRACTICE 280 (9th ed. 2007).

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[6] The petition contends, in passing, that the decision below clashes with the "approach" of circuits that have found reverse preemption where state law did not "provide remedies comparable to those available under RICO." Pet. 29-30. *Humana*, however, holds that the fact that federal law "provides materially different remedies," standing alone, does not compel reverse preemption. 525 U.S. at 305. In any event, other circuits have rejected reverse preemption where state law provides no remedy at all. *See, e.g., Am. Chiropractic Ass'n, Inc. v. Trigon Healthcare, Inc.*, 367 F.3d 212, 232 (4th Cir.), *cert. denied*, 543 U.S. 979 (2004); *BancOklahoma Mortgage Corp. v. Capital Title Co.*, 194 F.3d 1089, 1099 (10th Cir. 1999).

On remand, the court or jury will be free to find for Cassens on any lawful ground, in which case review of the question presented would not be necessary (or appropriate). This case is an even less appropriate vehicle for immediate, interlocutory review than was *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (*VMI*). There, the Fourth Circuit had issued a final decision holding that the Commonwealth of Virginia's sponsorship of a military college that excluded women was unconstitutional, but the district court had yet to rule on the appropriate remedy. The Court denied certiorari on the ground that the decision was not sufficiently final because the remedy phase had not been completed. *See id.* at 946 (Scalia, J., concurring). The Court recognized that there would be time enough to review the decision if that were necessary after the remedial portion of the case had concluded, *id.*, and, in fact, it later did so. *See United States v. Virginia*, 518 U.S. 515 (1996). Here, there has been no decision regarding liability, let alone the appropriate remedy.

Of course, respondents believe they will prevail on the merits. If they do, Cassens may appeal from the final decision and, ultimately, petition the Court on the reverse-preemption defense (or any other properly preserved federal issue). *See VMI*, 508 U.S. 946 (Scalia, J., concurring). Moreover, unlike the *VMI* case, which was *sui generis*, here, if Cassens is correct that the issue of reverse preemption in RICO fraud suits against self-insured employers arises frequently in the courts of appeals, there will be any number of appropriate future vehicles that would allow this Court to resolve the question. In the meantime, the Court should stay its hand and allow the case to run its course.

IV. CASSENS AND ITS AMICI EXAGGERATE THE PRACTICAL IMPACT OF THE DECISION BELOW.

Lacking a conflict concerning an important legal issue, Cassens and its amici resort to sweeping and unsupported statements about the practical effects of the decision below. Pet. 30-33. But, as explained above, the premise underlying many of these predictions is itself wrong. Cassens' warnings—that the decision "threaten[s] to interfere with state insurance regulation" and "disrupt Congress's allocation of responsibility between the States and the federal government in matters of insurance regulation"—merely restate its position on the merits. Pet. 30, 31. If any one of the Sixth Circuit's three independent rationales on the first question presented is correct, then there is no potential for disruption of state insurance regulation because the regulation of insurance is not even at issue: Workers' compensation is not insurance, and self-insurance under a workers' compensation scheme is even further afield.

In any event, the speculation of Cassens and its amici is just that: speculation. It has been a full year since the Sixth Circuit's decision in this case was first handed down and no appellate court, state or federal, has either adopted or rejected Cassens' benefits-as-insurance or insurance-provisions theories. Nor has there been a flood of lawsuits. Ten years ago, just before this Court unanimously held in *Humana* that the RICO fraud suit there was not reverse preempted, industry amici made similarly dire predictions, speculating that allowing such suits would "seriously threaten sound insurance regulation by the several states." Br. for Alliance of Am. Ins., et al. as Amici Curiae 18-30, in *Humana v. Forsyth* There is no evidence that those predictions proved true. Better to await the final disposition of the proceedings in

this case and additional decisions on the viability of Cassens' novel reverse-preemption theories than to prematurely grant review concerning questions that may not ever produce disagreement among the lower courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DEEPAK GUPTA
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

MARSHALL LASSER
P.O. BOX 2579
Southfield, MI 48037

Counsel for Respondents

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